STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

DOROTHY MINTER,

Plaintiff/Appellee,

vs.

CITY OF GRAND RAPIDS and
JOHN EDWARD-RHEEM WETZEL,

Defendants/Appellants.

Supreme Court Case No. _____
COA Case No. 255321 273017
Kent County Circuit Court
Case No. 03-05719 NI

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PLAINTIFF/APPELLEE'S BRIEF IN RESPONSE TO DEFENDANTS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

EXHIBITS

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STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS MAJORITY CORRECTLY HOLD THAT MATERIAL QUESTIONS OF FACT EXISTED REGARDING THE NATURE AND EXTENT OF PLAINTIFF'S INJURIES, WHEN IT REVERSED THE TRIAL COURT'S RULING TO THE CONTRARY?

Plaintiff/Appellee Answers:	Yes
Defendant/Appellants' Answer:	No
Trial Court's Answer:	No
Court of Appeals Majority Answers:	Yes

II. IS A DEFENDANT ENTITLED TO SUMMARY DISPOSITION OF A THRESHOLD INJURY CLAIM WHEN A PLAINTIFF FAILS TO FILE A PROPER PHYSICIAN'S AFFIDAVIT PURSUANT TO MCL 500.3135(2)(A), REGARDING A POSSIBLE CLOSED HEAD INJURY?

Plaintiff/Appellee Answers:	No
Defendant/Appellants Answer:	Yes
Trial Court's Answer:	No
Court of Appeals Majority Answers:	No

III. DID THE COURT OF APPEALS CORRECTLY OVERTURN THE TRIAL COURT'S APPLICATION OF THE KREINER FACTORS, REGARDING PLAINTIFF'S CLAIMED CLOSED HEAD INJURY?

Plaintiff/Appellee Answers:	Yes
Defendant/Appellants Answer:	No
Trial Court's Answer:	No
Court of Appeals Majority Answers:	Yes

IV. DID THE COURT OF APPEALS CORRECTLY OVERTURN THE TRIAL COURT'S APPLICATION OF THE *KREINER* FACTORS, REGARDING PLAINTIFF'S FACIAL SCAR?

Plaintiff/Appellee Answer:	Yes
Defendant/Appellants Answer:	No
Trial Court's Answer:	No
Court of Appeals Majority Answers:	Yes

JUDGMENT OR ORDER APPEALED FROM

Defendants file an application for leave to appeal from the published Court of Appeals Opinion dated April 12, 2007, in Court of Appeals Docket No. 273017. The Court of Appeals Opinion was authored by Judge Alton T. Davis and contained a concurring opinion by Judge Peter D. O'Connell, as well as concurrence/dissent by Judge Christopher M. Murray.

This Court should DENY this application for leave to appeal, and remand this case back to the trial court for immediate trial.

RELIEF SOUGHT

Plaintiff/Appellee, Dorothy Minter, respectfully requests that this Honorable Court DENY Defendants' application for leave to appeal and remand this case back to the trial court for immediate trial.

I. STATEMENT OF FACTS

Plaintiff/Appellee, Dorothy Minter, is a 70 year-old-woman who at the time of this motor vehicle collision, was completely independent in all normal activities of daily living and was under no physical restrictions by any treating physician. (D. Tpr., Dorothy Minter, pg 18, ln 1, lns 5-17.) Plaintiff/Appellee testified that prior to the motor vehicle collision, she was, "in pretty good health" with no history of headaches, memory problems, concentration problems, or difficulty sleeping. (D. Tpr., Dorothy Minter, pg 17, lns 4, 17, 18 and 22.)

Prior to the collision, Plaintiff/Appellee, Dorothy Minter, testified that she was capable of performing her own grocery shopping, taking out the trash and was actively engaged in a variety of social activities including playing with her grandchildren and attending card games. (D. Tpr., Dorothy Minter, pg 19, lns 10-18, ln 23.)

Defendant/Appellant, John Edward-Rheem Wetzel, is a Grand Rapids Police Officer having joined the force on November 16, 1998 (D. Tpr., Defendant/Appellant, Wetzel, pg 9, ln 12).

On August 15, 2002, Defendant/Appellant, Wetzel was a Grand Rapids Police Officer working the afternoon shift (D. Tpr., Defendant/Appellant, Wetzel, pg 10, ln 10). Defendant/Appellant, Wetzel, was patrolling an area of the City of Grand Rapids approximately three and one-half miles away from the intersection of Lafayette and Sycamore. (D. Tpr., Defendant/Appellant, Wetzel, pg 15, ln 12). Defendant/Appellant, Wetzel testified that he was familiar with the intersection of Lafayette and Sycamore having routinely patrolled that area on previous occasions. (D. Tpr., Defendant/Appellant, Wetzel, pg 11, ln 21-24).

About fifteen minutes into his afternoon shift, Defendant/Appellant, Wetzel, heard a radio call that an officer was in pursuit of a suspect in the general area of Lafayette and Sycamore. Defendant/Appellant, Wetzel, heard the radio call on an open channel requesting the assistance of available officers.

In accordance with his responsibilities as a Grand Rapids Police Officer, Defendant/Appellant, Wetzel, responded to the radio call initialing turn on his lights and siren. (D. Tpr., Defendant/Appellant, Wetzel, pg 16, ln 14). Defendant/Appellant, Wetzel, turned off a main road onto southbound Lafayette which has a speed limit of 25 mph. (D. Tpr., Defendant/Appellant, Wetzel, pg 17, ln 5).

Defendant/Appellant, Wetzel confirms that at no time prior to, during or after the incident, did he ever come to realize the exact nature of the police call. (D. Tpr., Defendant/Appellant, Wetzel, pg 18 ln 1-3).

As Defendant/Appellant, Wetzel began to proceed southbound on Lafayette, Grand Rapids Police Officer Swanson was in her own squad car immediately in front of him. Both officers were proceeding southbound on Lafayette approaching its intersection with Sycamore.

According to Defendant/Appellant, Wetzel officer Swanson stopped her patrol car on southbound Lafayette at or near its intersection with Sycamore. It was Defendant/Appellant, Wetzel's initial intention to stop his patrol car behind Officer Swanson and exit his vehicle to assist in securing the perimeter of the scene. (D. Tpr., Defendant/Appellant, Wetzel, pg 24, ln 15). It was Defendant/Appellant, Wetzel's intention to exit his vehicle and then proceed on foot up Sycamore to Prospect.

As Defendant/Appellant, Wetzel slowed his patrol car down behind Officer Swanson, he turned off his overhead lights and siren. (D. Tpr., Defendant/Appellant, Wetzel, pg 30, ln 13).

According to Defendant/Appellant, Wetzel, he then abandoned his initial intention to stop his patrol car behind Officer Swanson and elected to turn left proceeding eastbound up Sycamore to Prospect. (D. Tpr., Defendant/Appellant, Wetzel, pg 31, ln 17). According to Defendant/Appellant, Wetzel, he never brought his patrol car to a complete stop. (D. Tpr., Defendant/Appellant, Wetzel, pg 31, ln 22).

According to Defendant/Appellant, Wetzel, there was a school bus parked on the northbound side of Lafayette in the curb lane. In addition, there was another motor vehicle parked

immediately behind the school bus on the northbound of Lafayette as well. Defendant/Appellant, Wetzel testified that the rear of the motor vehicle behind the school bus was, "a few feet from the actual intersection." (**Exhibit 1 -- Grand Rapids Police Department diagram**).

Assuming arguendo that Defendant/Appellant Wetzel's version of the events and the placement of the motor vehicles is accurate, Defendant/Appellant, Wetzel concedes that his line of sight of the pedestrian walkway was completely obstructed by the parked school bus and motor vehicle parked behind same. (D. Tpr., Defendant/Appellant, Wetzel, pg 33, ln 2 -10). Defendant/Appellant, Wetzel further testified that it was intention to proceed up Sycamore to Prospect "quickly". (D. Tpr., Defendant/Appellant, Wetzel, pg 34, ln 9-11). Defendant/Appellant, Wetzel further testified that as he turned left, he had no view of the crosswalk. (D. Tpr., Defendant/Appellant, Wetzel, pg 34, ln 16-19).

As Defendant/Appellant, Wetzel made the left hand turn, he apparently turned on his lights which emitted no sound and did not activate his siren. (D. Tpr., Defendant/Appellant, Wetzel, pg 32, ln 5-9, 13).

As Defendant/Appellant, Wetzel made the left hand turn, he was traveling between 15 and 20 mph with activated no siren on into a crosswalk that was completely obstructed by parked motor vehicles. (D. Tpr., Defendant/Appellant, Wetzel, pg 35, ln 11).

As Defendant/Appellant, Wetzel proceeded with the left hand turn, he violently struck Plaintiff/Appellee, Dorothy Minter, who was innocently walking across Sycamore Street at the point where there would be a designated crosswalk had same actually been painted on the street. Defendant/Appellant, Wetzel candidly admits that he did not yield the right of way to Plaintiff/Appellee, Dorothy Minter as she was lawfully proceeding across Sycamore. (D. Tpr., Defendant/Appellant, Wetzel, pg 46, ln 12-15). Defendant/Appellant, Wetzel further confirms that the Grand Rapids Police Department investigation assessing fault to him is factually and legally correct. (D. Tpr., Defendant/Appellant, Wetzel, pg 47, ln 15).

The Grand Rapids Police Department conducted a fairly comprehensive investigation into this incident. The standard UD 10 Report assesses Defendant/Appellant, Wetzel a hazardous action for failing to yield right of way. (**Exhibit 2 -- Grand Rapids Police Department Report UD 10**).

An investigation conducted by Grand rapids Police Officer Greg Edgcombe, Badge #283 further concludes that Defendant/Appellant, Wetzel turned left up Sycamore with his overhead lights on but no siren on. The investigation further concluded that Defendant/Appellant, Wetzel's motor vehicle traveled approximately 9 feet after striking Plaintiff/Appellee. The drag factor concluded that Plaintiff/Appellee, Dorothy Minter was struck at approximately 14 mph. The final conclusion opined that Plaintiff/Appellee was crossing the roadway legally. The final conclusion further confirmed that Officer Wetzel was at fault for the collision. (**Exhibit 3 --Grand Rapids Police Investigation of Greg Edgcombe).**

As a result of Defendant/Appellant, John Edward-Rheem Wetzel's careless, reckless, willful, wanton, negligent and/or gross negligent operation of his motor vehicle, Plaintiff/Appellee, Dorothy Minter, sustained serious and permanent personal injury to her head, neck and lower extremities. Attached for the Court's review is a photograph of Plaintiff/Appellee, Dorothy Minter, taken at the scene of the collision as she was placed upon a back board with a head brace. The photograph depicts a severe gash above Plaintiff/Appellee's right eyebrow. (**Exhibit 4 -- Photograph of Plaintiff/Appellee**).

Plaintiff/Appellee, Dorothy Minter, has undergone subsequent medical care and treatment for a closed head injury including headaches, dizziness, short term memory dysfunction and other cognitive impairments, as well as cervical injury and a fractured toe. Furthermore, Plaintiff/Appellee, Dorothy Minter sustained serious permanent disfigurement as a result of Defendant/Appellant, Wetzel's actions as alleged. Plaintiff/Appellee, Dorothy Minter, continues to suffer from serious impairment of body function and normal activities of daily living.

On or about June 19, 2003, the within matter was commenced in the Kent County Circuit Court.

Defendant/Appellants, City Of Grand Rapids and Wetzel were granted Summary Dismissal of this matter for the reasons set forth in the record before this Honorable Court. The Michigan Court of Appeals reversed the trial court's decision.

II. STANDARD OF REVIEW

Defendant/Appellants have brought a Motion for Summary Disposition under MCR 2.116(C)(10).

A Motion brought pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. The Court must consider the pleadings, Affidavits, depositions, admissions and other documentary evidence available to it. The party opposing the Motion has the burden of showing that a genuine issue of disputed fact exists. All inferences will be drawn in favor of the nonmovant. The Court must determine whether a record could be developed that would leave open an issue upon which reasonable minds could differ. Cason v Auto Owners Insurance Company, 181 Mich App 600, 605; 405 NW2d 6 (1989).

A Trial Court presented with a Motion for Summary Disposition under MCR 2.116(C)(10) must give the benefit of reasonable doubt to the nonmovant and must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. All inferences are to be drawn in favor of the nonmovant. Before summary disposition may be granted, the Court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. Arbelius v Poletti, 188 Mich App 14, 18; 469 NW2d 436 (1991).

When ruling on a Summary Disposition Motion under MCR 2.116(C)(10), Courts are liberal in finding that a genuine issue exists, drawing all inferences in favor of the nonmovant and granting the Motion only when the Court is satisfied that it is impossible for the claim to be supported at trial because of some deficiency that cannot be overcome. Langeland v Bronson Methodist Hospital, 178 Mich App 612, 615-616; 444 NW2d 146 (1989).

The Court must carefully avoid substituting a trial by affidavit and deposition for a trial by jury. The Court is not allowed to make findings of fact or weigh the credibility of affiants or deponents. Soderberg v Detroit Bank and Trust Company, 126 Mich App 474, 479; 337 NW2d 364 (1983).

III. APPLICABLE LAW ON THE LEGAL ISSUE OF " SERIOUS IMPAIRMENT OF BODY FUNCTION"

With regard to the issue of "serious impairment of a body function" under the No-Fault Act, on March 28, 1996, the Michigan No-Fault Statute was amended in 1986 making several changes in the tort threshold provisions of the Michigan No-Fault Act (MCLA 500.3135).

The Michigan legislature did not codify the standard for serious impairment as reflected in Cassidy v McGovern, 415 Mich 43; 330 NW2d 22 (1982). Rather, the legislature created a new standard. The new statutory definition of serious impairment of a body function is:

> **An objectively manifested impairment of an important body function that affects the persons ability to lead his/her normal life. MCLA 500.3135 (7).**

Therefore, there are now three (3) elements to the definition of, "serious impairment of body function." First, the injury/impairment must be **"objectively manifested."** Second, the body function impairment must be an **"important body function."** Third, the impairment must **"affect the person's general ability to lead his or her normal life."**

A. Objective Manifestation

The definition of "objective manifestation" is stated in SJI2d 36.11. SJI2d 36.11, states:

> **In order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis.**

This is the definition as put forth in DiFranco v Pickard, 427 Mich 32 (1986). In fact, the note or use under SJI2d 36.11, states:

> **The definition of objectively manifested comes from DiFranco.**

In Argentia v Shahand, 135 Mich App 477, 354 NW2d 796 (1989), the Court ruled at page 802:

> **It is obvious that the Plaintiff's ability to move his back is an important body function. Plaintiff's restricted ability to move his back is an objective manifestation of his injuries.**

Section 3135, as amended has made Argentia the law and has statutorily overruled the objective medical measurement definition of objective manifestation.

DiFranco ruled that objective manifestation did not require the impairment of injury to be subject to medical measurement, but only that it be **"medically identifiable."** Any injury properly diagnosed as cervical, thoracic or lumbar sprain, myositis and/or fibromyalgia is a medically identifiable injury which will meet the threshold if it meets the other two (2) components. In DiFranco, the Court ruled:

> **Section 3135(1) and Cassidy require the Plaintiff to prove that his non-economic losses arose out of a medically identifiable injury which seriously impaired a body function. The interpretation of Cassidy's "objectively manifested injury" requirement adopted in Williams v Payne, 131 Mich App 403, 346 NW2d 564 (84) is rejected. DiFranco, 398 NW2d at 901.**

Therefore, until or unless the DiFranco definition of objective manifestation is overruled or changed by the Supreme Court, the definition applies. The trial judge must consider as an objective manifestation of injury, a doctor's diagnosis of muscle strain and a doctor's basis for that diagnoses. The Court cannot rule out of hand any of the doctor's findings or any of the Plaintiff's complaints or restrictions as not being **"within the objective manifestation"** component.

B. The Important Body Function Requirement

MCLA 500.31345, as amended, requires that the body function be important. Therefore, we cannot disregard all of the cases decided after Cassidy and before DiFranco. However, once the Court decides that the motion and movement of a person's neck or back is an

important body function, it must be, as a matter of law, an important body function, for all persons.

In Meklir v Bingham, 147 Mich App 716; 383 NW2d 96 (1985) at page 98, the Court held:

> **We do not doubt that the ability to move ones back is an important body function.**

Also in Meklir at page 98, the Court stated:

> **We would also agree that movement of ones neck and hand are also important body functions.**

In Harris v Lemicex, 152 Mich App 149; 393 NW2d, 554 (1986) at page 560, the Court held:

> **In the instant case, we find that Plaintiff's ability to move her back is an important body function**. (A diagnosis was made by a chiropractor of a low back strain with myofascitis).

In Argentia v Shahand, *supra*, the Court held:

> **It is obvious that Plaintiff's ability to move his** back is an important body function.

C. Affects the General Ability to Lead Her Normal Life

The main thrust of Defendant/Appellant's argument for their Motion for Summary Disposition alleges that Plaintiff/Appellee's injuries do not affect her general ability to lead her normal life. Of course Defendant/Appellant cites the new Michigan Supreme Court Decision in Kreiner v Fischer, No.124757 (Mich. 7-23-04) in support of its argument. MCLA 500.3135 (7) requires only that the impairment affect the person's ability to live her normal life.

The Michigan Supreme Court in the new Kreiner decision did not change the **"subjective"** test as codified by MCLA 500.3135 (7). The old purely objective test as contained in Cassidy v McGovern, *supra*, was changed by both the DiFranco and MCLA 500.3135(7) to a subjective test. What is **"normal"** is to be determined subjectively on the basis of

Plaintiff/Appellee's own life and not the life of some objective third party. (Kreiner v Fischer, No. 1247577 (Mich. 7-23-04 at pg 5)

Prior to the Michigan Supreme Court's recent Kreiner decision, the case law indicated that the Court should look at what the Plaintiff/Appellee's life was like prior to the automobile collision compared to his life after the collision.

In the most recent Kreiner Decision, the Michigan Supreme Court applied the same test:

> **"In determining whether the course of Plaintiff's life has been affected, a Court should engage in whether the course of Plaintiff's life has been affected, a Court should engage in a multi-faceted inquiry, comparing Plaintiff's life before and after the collision, as well as the significance of any affected aspects of the course of Plaintiff's overall life ... we do not require that every aspect of Plaintiff's life be affected in order to satisfy the tort threshold." (at pg. 27-28)**

Therefore the test as set forth in Kreiner, *supra*, is not a return to a Cassidy standard. The Michigan Supreme Court in Kreiner, *supra*, not only kept the subjective test as to the affect on Plaintiff's own personal life, but also kept the test comparing Plaintiff/'s lifestyle before and after the collision.

The Michigan Supreme Court in Kreiner, *supra*, in addition to comparing Plaintiff's lifestyle before and after the collision stated that the affect on a person's general ability to lead his normal life need not be serious. **"Although a 'serious' affect is not required, 'any' affect does not suffice either."**

The Michigan Supreme Court in Kreiner, *supra*, appears to set forth a new definition in addition to comparing the Plaintiff's lifestyle before and after the collision in that the "impairments must 'change' the course or trajectory of Plaintiff's normal life."

In Kreiner, the Plaintiff did not miss even one day of work. He continued to perform all of the duties of his job six (6) hours per day with the exception of not being able to lift over 80 pounds. In Straub, *supra*, the Plaintiff injured the fingers on his non-dominant hand. He missed

only eight (8) weeks of work. His fingers healed within two (2) months and he had no further treatment.

The Michigan Supreme Court in deciding both Kreiner and Straub, found that the course and/or trajectory of each of those Plaintiff's normal life had not been affected. The Court determined that looking at their life as a whole, each Plaintiff's post impairment life is not so different than his general ability to lead their normal life.

More recently, the Michigan Court of Appeals in Luther v Morris (Docket #125668) clarified aspects of the Kreiner opinion as it related to the threshold determination of, "serious impairment of body function".

In Luther, Plaintiff, Sarah Luther sustained a dislocated elbow during a motor vehicle accident. Plaintiff testified that she missed approximately 52 days of work as an automobile parts inspector. Plaintiff additionally testified that following the accident, she lived with his sister for about three weeks. Plaintiff testified that during the initial period of convalesce, she was unable to drive for several weeks following the accident.

The Luther Court in determining whether Plaintiff's injuries constituted, "serious impairment of a body function", cited the Kern v Blethen-Coluni, 240 Mich App 333 (2000) opinion wherein the Court indicated that, "the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, duration of disability,

The Court viewed evidence that Plaintiff was unable to hold a coffee pot, dropped objects at home, needed assistance of co-workers to carry heavy objects at work, could not bow hunt, had difficulty taking the garbage out, washing clothes and bathing and suffered pain in lifting herself out of bed in the morning.

The Court in finding that Plaintiff suffered a serious impairment of a body function as a matter of Law, indicated, "although the impairment was short lived, the impairment left Plaintiff virtually unable to do anything for herself, or to undertake tasks in the same manner as she had done before the injury: the impairment was extensive.

The Luther Court by logical inference determined that an injury need not be permanent and that the harsh language of the Kreiner Court must be tempered with an analysis of the extent to which an injury has impaired an injured party's, "general ability to conduct the course of their life." **(Exhibit 5 -- See attached Luther opinion)**.

On September 27, 2005, the Michigan Court of Appeals issued a published Opinion further interpreting Kreiner, *supra*.

In McDanield v Hemker (Court of Appeals #263150), Mable Lorraine McDanield was injured in a motor vehicle collision sustaining injuries alleged to constitute a "serious impairment of a body function." Ms. McDanield hit her head on the side of the window of the motor vehicle and then sustained a head and neck flexion extension injury when the motor vehicle came to a rest. Ms. McDanield began to experience immediate neck pain at the scene of the collision.

The Court went through an in depth analysis concerning the effects of the injuries upon Ms. McDanield's general ability to lead her normal life focusing upon recreational activities and gardening activities as well as time lost from work and that the relationship with husband which was negatively impacted. It is significant that the vast majority of the physical restrictions testified to by Ms. McDanield were self imposed restrictions although physician supported.

The Court went through an exhaustive list of factors in determining whether Plaintiff's injuries amounted to a "serious impairment of a body function" including:

a. the nature and extent of the impairment;
b. the type and length of treatment required;
c. the duration of the impairment;
d. the extent of any residual impairment; and
e. the prognosis for eventual recovery.

The Court indicated that a short duration of impairment does not necessarily preclude a finding of "serious impairment of a body function".

The Court recognized that Ms. McDanield was off work from employment as a school bus driver and food service person for the Reed City School District. Ms. McDanield's doctor, Dr. John H. Kilgore restricted her from working during this initial period of disability because of pain which

was mainly in her neck and shoulder. Dr. Kilgore's diagnosis was, "traumatic cervical myositis". Ms. McDanield's further complained of increased neck pain plus numbness and tingling radiating into her right arm and hand. Dr. Kilgore further noted that there was evidence of muscle spasm.

The injuries to Ms. McDanield were ultimately diagnosed as "chronic neck pain, whiplash syndrome, neck and parascapular myofacial pain and cervicogenic headaches". Ms. McDanield was ultimately administered nerve blocks.

The Court reviewed Ms. McDanield's testimony concerning her limitations with regard to her cervical and trapezius area. The Court reviewed Ms. McDanield's testimony concerning the normal activities of daily living from which she was disabled.

In viewing the record in the most favorable light to Plaintiff, the Court ultimately concluded that Ms. McDanield's injuries constituted a serious impairment of body function. The Court concluded that Plaintiff had established an objectively manifested impairment of an important body function that affected her general ability to lead her normal life.

The Court focused upon the medical records of Ms. McDanield's treating physician to establish the medically identifiable injury to the cervical region which resulted in restriction based upon pain through the effected area. **(Exhibit 6 -- Mable Lorraine McDanield v John Tyler Hemker, Court of Appeals 263150)**.

IV. THE RECORD BEFORE THIS HONORABLE COURT ESTABLISHES A QUESTION OF FACT AS TO WHETHER PLAINTIFF/APPELLANT, DOROTHY MINTER SUSTAINED A SERIOUS IMPAIRMENT OF BODY FUNCTION

Immediately after the collision, Plaintiff/Appellee, Dorothy Minter, was transferred via EMS to Spectrum/Butterworth Hospital.

Upon admission, a medical history reveal that Plaintiff/Appellee, Dorothy Minter, sustained, "loss of consciousness, a scalp laceration, right eyelid laceration, multiple abrasions and contusions and a cervical strain." Plaintiff/Appellee also complained of pain in her right big toe as well a worsening headache and an episode of vomiting.

Upon returning to Spectrum Health/Butterworth campus the following day, a further examination of the right big toe revealed a fracture along with worsening cephalgia.

The provisional diagnosis was (1) blunt head trauma, status post automobile versus pedestrian, (2) evaluation of worsening cephalgia, and (3) fracture right big toe. (**Exhibit 7 -- Medical records Spectrum Health/Butterworth Campus**).

On August 20, 2002, Plaintiff/Appellee sought follow up treatment with Dr. David J. Bielema. Dr. Bielema is a Board Certified Orthopedic Surgeon and rendered medical care and treatment to Plaintiff/Appellee, Dorothy Minter's cervical area only. The August 20, 2002 medical reflects lacerations on the forehead with symptoms consistent with cervical strain.

The September 3, 2002 medical record reflects complaints of pain throughout the cervical area. The November 19, 2002 medical record reflects continued complaints in the supraorbital region which Plaintiff/Appellee described as a sense of "numbness in the area and has a supraorbital scar over her right eye with some modest keloiding." At that time, Dr. Bielema was concerned that she may have "a supraorbital nerve entrapment or need a scar revision." (**Exhibit 8 -- Medical records, David J. Bielema, MD**).

Concurrent with Dr. Bielema's, Plaintiff/Appellee sought medical care and treatment at the Cherry Street Health Services. Treatment was upon referral of Butterworth Hospital. During the initial treatment, Plaintiff/Appellee described that she was very nervous and continued to have difficulty with sleeping and is very jumpy. The examination of the right lower extremity revealed the fractured toe. Celebrex was prescribed because of the multiple contusions and right forehead lacerations, as well as the fracture to the right great toe. In addition, Plaintiff/Appellee was diagnosed with probable post traumatic stress syndrome. (**Exhibit 9 -- Paramedical records from Cherry Street Health Services**).

Beginning September 18, 2002, Plaintiff/Appellee, Dorothy Minter, commenced treatment with Dr. Mervyn W. Smith. at the Michigan Fuller Family Medicine Clinic. Attached for the Court's review, are Dr. Smith's medical records beginning September 18, 2002 through October 31, 2003.

The initial office visit documents a "loss of consciousness with continued problems with memory and dizziness. Plaintiff/Appellee also complained of persistent headaches in the forehead and behind the eyes. Plaintiff/Appellee described headaches waking her up from sleeping. Plaintiff/Appellee also described unsteadiness on her feet and that she feels like she is going to pass out. Plaintiff/Appellee further described and multiple complaints of pain in the right foot in the area of the fracture.

Dr. Smith's diagnosis was (1) closed head injury with residual symptoms of vestibular dysfunction, dizziness, headaches, and neck pains, (2) post concussion syndrome, patient continues to have headaches, and (3) fractured right great toe.

The medical records document persistent complaints consistent with a closed head injury. Dr. Smith ultimately referred Plaintiff/Appellee to the Spectrum to the Minor Brain Injury Clinic. Treatment at the Brain Clinic will be documented further.

As late as October 31, 2003, Dr. Smith continued to treat Plaintiff/Appellee for the natural sequela of the closed head injury. Mr. Smith documented headaches, dizziness and memory problems. Dr. Smith described anxiety and depression associated with the motor vehicle collision.

As late as February 23, 2004, Dr. Mervyn Smith authored an attending physician report and disability certificate documenting the concussion, dizziness, head injury, depression and memory deficits relating back to the subject occurrence. Dr. Smith prescribed assistance with household chores and normal activities of daily living. Dr. Smith further noted the compensatory strategies developed through the Brain Injury Clinic at Spectrum. (**Exhibit 10 -- Medical records, Dr. Mervyn Smith, and Service Affidavit**).

On July 21, 2006, Mervyn Smith, M.D. authored an Affidavit of sworn testimony concerning medical care and treatment received by Plaintiff/Appellee, Dorothy Minter, in connection with her closed head injury. During the oral argument before the Trial Court, the Affidavit was received as Plaintiff/Appellee's Exhibit 18 without objection by Defendants/Appellants. The Affidavit of Mervyn

Smith, M.D. was marked as Exhibit Number 18 and was introduced as evidence in the Trial Court. (**Exhibit 18 – Affidavit of Mervyn Smith, M.D.**)

The sum and substance of the Affidavit is self-explanatory. The Affidavit indicated that Mervyn Smith, M.D. treats individuals that have sustained closed head injuries as part of his family practice. Plaintiff/Appellee acknowledges that the phrase "regularly" does not appear in the Affidavit. However, Plaintiff/Appellee assets that paragraph number two sufficiently documents Dr. Mervyn Smith's practice of treating patients with "closed head injuries" as part of his practice.

Dr. Smith described the medical history, neurological injuries presented by Plaintiff/Appellee, Dorothy Minter, and the relationship to the subject motor vehicle collision. Dr. Mervyn Smith opines that the symptoms are consistent with traumatic brain injury secondary to the accident. Dr. Smith further opines that the post concussion syndrome sustained by Plaintiff/Appellee, Dorothy Minter, is related to the head injury sustained in the subject motor vehicle collision. Dr. Smith further opines that Plaintiff/Appellee's symptoms "may be consistent with serious neurological injury." Dr. Smith further testified by sworn affidavit the if called upon to testify at trial, he would testify consistently with the sum and substance of the Affidavit.

Subsequent to receiving the Affidavit without objection by the Trial Court, the Affidavit was returned to Plaintiff/Appellee's counsel with an **opinion** of the Trial Court indicating that the Affidavit would not be considered because it was not properly notarized.

This identical legal issue is now pending before the Michigan Supreme Court, Docket No. 131213. In Amelia Hosey v Chantay Starghill Berry, Unpublished Opinion, No. 257709 (**Exhibit 19 – Hosey unpublished opinion**) the trial court ruled that the documentary evidence offered by Plaintiff/Appellee in opposition to a Motion for Summary Disposition was inadmissible for foundational reasons and therefore the sum and substance of the medical opinions were not to be considered by the trial court.

The Michigan Court of Appeals, Docket No. 257709 ruled that although the document at issue may not in and of itself be admissible at trial, the sum and substance of the medical opinions

contained therein were admissible. The matter is now pending before the Michigan Supreme Court.

In the case at bar, Plaintiff/Appellee argues that even if the Affidavit of Mervyn Smith, M.D. is inadmissible as documentary evidence, the sum and substance of his medical opinions contained within the Affidavit, as well as his medical chart are admissible.

As this Court has said on many occasions, the plain and unambiguous language of a statute controls. Devillers v Auto Club Ins. Ass'n, 473 Mich 562, 483; 702 NW 2d 539 (2005) ("Statutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court.") Statutory language must be given its plain meaning and courts must not rewrite statutory language. Caneron v Auto Club Ins. Ass'n, 476 Mich 55, 63; 718 NW2d 784 (2006)("We believe this ruling was erroneous for the most uncomplicated reason; namely, that we must assume that the thing the Legislature wants is best understood by reading what it said."); Griffith v State Farm Mut. Auto. Ins. Co., 472 Mich 521, 526; 697 NW2d 895 (2005)("When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted.")(citation omitted); Cruz v State Farm Mut. Auto. Ins. Co., 466 Mich 588, 594; 648 NW2d 591 (2002)("the primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written.")(citation omitted).

These same rules of statutory interpretation apply to the language of the Michigan Court Rules. Grievance Administrator v Underwood, 462 Mich 188; 612 NW2d 116 (2000). In Grievance Administrator, this Court stated:

> When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. McAuley v General Motors Corp., 457 Mich 513, 518; 578 NW2d 282 (1998). Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. See Tryc v Michigan Veterans' Facility, 451 Mich 129, 135; 545 NW2d 642 (1996). Similarly, common words must be understood to have their everyday, pain mean. See M.C.L. § 8.3a;

MSA 2.212(1); see also Perez v Keeler Brass Co. 461 Mich 602, 609; 608 NW2d 45 (2000).

462 Mich at 193-94; Hyslop v Wojjuski, 252 Mich App 500, 505; 652 NW2d 517 (2002)("The rules governing statutory interpretation apply equally to the interpretation of court rules. ... If the pain and ordinary meaning of the language employed is clear, then judicial construction is neither necessary nor permitted and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used.")(citations omitted); Yudashkin v Linzmeyer, 247 Mich App 642, 652; 637 NW2d 257 (2001)("We must avoid constructions that render any part of a court rule surplusage or nugatory.")(citations omitted). In this case, the Court of Appeals upheld and enforced the pain language of the Michigan Court Rules as written.

The rule at issue, MCR 2.116(G)(6), provides that "[a]ffidavits, depositions, admissions, and documentary evidence offered in support of or in opposition to a motion based on subrule (C)(1)—(7) or (10) shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." The rule is consistent on the broad forms of documentary evidence allowed:

> (3) Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required (a) when the grounds asserted do not appear on the face of the pleadings, or (b) when judgment is sought based on subrule (C)(10).
>
> (4) A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provide din this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing hat there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

MCR 2.116(G)(3),(4). This Court has asked whether "a trial court, in deciding a motion for summary disposition, [is permitted] to consider unsworn statements or opinions of potential witnesses contained in documents that may be inadmissible at trial."

The plain language does not exalt form over substance. The rule includes "documentary evidence" among the types of evidence used to oppose or support summary disposition under MCR 2.116(C)(10), along with affidavits, depositions, and admissions. The rule requires that the "content or substance" of any evidence (documents, affidavits, depositions) be admissible. The rule does not require that the form of the evidence itself be admissible. An interpretation that the form must be admissible would render the "content or substance" language superfluous.

The operative language regarding admissibility of evidence used to support or oppose summary disposition motions was added to MCR 2.116(G)(6) in 2000 (effective in 2001) to codify this Court's decision in Maiden v Rozwood, 461 Mich 109, 121; 597 NW2d 817 (1999). See Comment to 2000 Amendment. In Maiden, this Court clarified that the 1985 amendments had rejected the standard set forth in Rizzov Kretschmer, 389 Mich 363; 207 NW2d 316 (1973), that summary disposition is appropriate only where it is "impossible for the claim to be supported by evidence at trial." 461 Mich at 120. This Court continued:

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.

461 Mich at 121. This Court held that "the **content or substance** of the evidence proffered must be admissible in evidence." 461 Mich at 123.

In Maiden, this Court focused on a statement contained within a police report and concluded that the statement was inadmissible hearsay that did not come within any of the exceptions in the Michigan Rules of Evidence. While acknowledging that the police report itself arguably may be admissible, this Court concluded: "Because Myles' statement to the police

describing the actions of the codefendants does not fall within any of the enumerated hearsay exceptions, the police report is inadmissible and may not be considered in opposing the motion for summary disposition." 461 Mich at 125 (footnote omitted).[1]

The plain language of the amended MCR2.116(G)(6) focuses on the content and substance of the evidence offered. "Content" and "substance" refer to the underlying nature of a thing, not its form. Webster's New Collegiate Dictionary (1959) defines "substance" and "content" as follows.

"Substance" is:

> 1. That which underlies all outward manifestations; real, unchanging essence or nature of a thing; that in which qualities inhere; that which constitutes anything what it is. 2. Essential element or elements; characteristic components; as, the ideas are the same in substance. 3. Essential import; gist; as, the substance of what he said.

"Content" is:

> 1. Usually pl. That which is contained; as, the contents of a cask. 2. pl. The topics or matter treated in a document or the like. 3. The sum and substance; the gist, as of a discourse; hence, essential meaning.

In this case, there is no dispute that the doctor's reports constitute "documentary evidence," whether admissible or not.[2] The issue is whether the substance or content of (i.e., the matters within) the reports is admissible.

[1] This Court in Maiden also recognized that the focus on substance or content is consistent with the Federal Rules 461 Mich at 124 n.6. The Federal Rules are more restrictive than the Michigan Rules because the Federal Rules do not contain the "documentary evidence" catchall, yet the Federal Rules still focus on the substance and content, not the form. See Gleklen v Democratic Congressional Campaign Committee, Inc., 199 F.3d 1365, 1369 (C.A.D.C. 2000)("While a nonmovant is not required to produce evidence in a form that would be admissible at trial, the evidence still must be capable of being converted into admissible evidence."); Ashbrook v Block, 917 F.2d 918, 921 (C.A.6, 1990)("although the nonmoving party's evidence in opposition to summary judgment need not be of the sort admissible at trial, he must employ proof other than his pleadings and own affidavits to establish the existence of specific triable facts.")(citation omitted); Macuba v Deboer, 193 F.3d 1316, 1322-24 (C.A.11,1999); Imhof v Metropolitan Life Ins. Co., 858 F.Supp. 91, 93 (E.D. Mich, 1994)("the evidence itself need not be the sort admissible at trial.")(citing Ashbrook, *supra*).

[2] Otherwise, there would be no need for the distinction between admissible and inadmissible evidence and the rules of evidence would become superfluous.

The Court of Appeals properly and faithfully adhered to the plain language of the Court Rules: "Although the reports themselves are inadmissible, the doctors' opinions would be admissible in the form of opinion testimony at trial. ...because the doctors' opinion testimony would be admissible at trial, their opinions, contained in the inadmissible reports, suffice to support plaintiff's response to defendant's motion for summary disposition. In their opinions, the doctors state that plaintiff's injuries were caused by the accident." The doctors' reports, regardless of form, contain the opinions of the doctors. Those opinions themselves are not hearsay, but opinions based on personal knowledge and professional expertise.[3]

Enforcement of the plain language of the rule serves the practical purpose of the rule as well. The rule is designed to week out those cases for which no genuine material issue exists for trial. E.g., Hall v Hackley Hosp., 210 Mich App 48, 53; 532 NW2d 893 (1995)("A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim.")(citation omitted). While an affidavit or a deposition may be in admissible form, this does not mean that the substance or content is admissible. For example, an affidavit in which the affiant relates a statement made by a third party is insufficient because the statement itself is hearsay and not within one of the enumerated exceptions. See Pitsch v ESE Michigan, Inc., 23 Mich App 578, 598; 593 NW2d 565 (1999)("Plaintiff's representations in his affidavit regarding another person's observations do not establish a factual question because they are inadmissible hearsay.")(citation omitted); Maiden, *supra* (even if police report itself were admissible, the statements contained in the report – the substance or content of the report – were not). In this case, the doctors' opinions are reflected in the reports. This is not a situation in which the opinions themselves are hearsay or otherwise inadmissible. Indeed, the doctors will be able to testify as to causation between the accident and the injuries.

[3] This is not to say that the trier of fact will agree with those opinions, but the opinions demonstrate that there are genuine issues for the fact finder to resolve.

Furthermore, the rule does not requires that the nonmoving try the case on the summary disposition motion. Indeed, the nonmoving party has no control over when a summary disposition motion is brought. As a practical matter, the nonmoving party may not be able to obtain affidavits or deposition testimony of witnesses, particularly doctors, within the time for filing a response to such a motion.[4]

On October 3, 2002, Plaintiff/Appellee, Dorothy Minter, commenced medical care and treatment at the Spectrum Health Traumatic Brain Injury Clinic. Attached for the Court's review, is the medical chart complied on Plaintiff/Appellee, Dorothy Minter, at the Spectrum Health, Kent Community Campus, Mild Traumatic Brain Injury Clinic. (**Exhibit 11 -- Medical records, Traumatic Brain Injury Clinic**).

The initial medical record reflects a positive loss of consciousness, as well as the large forehead laceration on the right side. Initial physical complaints involved persistent headaches, hypersensitivity to light, and blurring of vision on the right side consistent with the area of the laceration. In addition, Mrs. Minter described considerable dizziness. Mrs. Minter further described an unsteadiness lasting 5-10 minutes. Mrs. Minter also described a nervous and anxiety sensation as well as ringing in the ears.

Dr. W. Christian VandenBerg performed a physical examination revealing restricted range of motion and symptoms consistent with a closed head injury.

After a complete evaluation, Dr. VandenBerg diagnosed Mrs. Minter as having suffered from a mild traumatic brain injury consistent with the brief loss of consciousness. Dr. VanderBerg also noted cervical pain and associate headaches. Dr. VandenBerg also noted vestibular dysfunction associated with dizziness.

Plaintiff/Appellee, Dorothy Minter, continued to treat with Dr. VandenBerg throughout the fall of 2002. Dr. VandenBerg noted Mrs. Minter's participation in the Speech and Language

[4] In its Order of September 15, 2006, this Court referred to "potential witnesses." Prior to actually being on the stand during trial or having a de bene esse deposition read at trial, all witnesses are "potential" witnesses. In this

Therapy for the closed head injury. As late as November 4, 2002, Dr. VandenBerg noted issues of forgetfulness and that the use of compensatory strategies proved to be of use.

Currently, Plaintiff/Appellee, Dorothy Minter, continues to treat with Dr. Mervyn Smith from a natural sequela associated with the closed head injury, cervical injury and right fractured toe.

OBJECTIVELY MANIFESTATION OF IMPAIRMENT OF AN IMPORTANT BODY FUNCTION

The record before this Honorable Court, including medical records as well as the sworn deposition testimony of Dr. Christian VandenBerg, establishes that Plaintiff/Appellee, Dorothy Minter, sustained a medically identifiable injury to her head, cervical and right lower extremity. Michigan Courts have long held the requirement of a objectively manifested impairment is satisfied by evidence that the injury is "medically identifiable" DiFranco, *supra*.

SUMMARY OF DEPOSITION TESTIMONY OF CHRISTIAN VANDENBERG, MD

On February 10, 2004, the deposition of Dr. Christian VandenBerg was taken for purposes of discovery. The pertinent sections of Dr. VandenBerg's testimony are summarized as follows:

Dr. Christian VandenBerg is the Medical Director at Spectrum and the Medical Director at the Mild Brain Injury Program at Spectrum as well. (D. Trp., Dr. Christian VandenBerg, pg 6 ln 4, page 8 lns 1-3.) Dr. VandenBerg evaluated Mrs. Minter on three separate occasions, same being October 3, 2002, November 4, 2002 and December 17, 2002.

It is significant that prior to the collision, Dr. VandenBerg notes that Mrs. Minter suffered from no injuries or symptoms consistent with a closed head injury. Dr. VandenBerg described the initial cervical injury to be a de-acceleration injury consistent with the motor vehicle collision. (D. Tpr., Dr. Christian VandenBerg, pg 15, ln 3, ln 20, pg 18 ln 24, pg 19 ln 5, ln 17.) Dr. VandenBerg further described an injury to the cervical region with associated restricted range of motion as an "objective" finding. (D. Tpr., Dr. Christian VandenBerg, pg 49 ln 1, ln 2-25, pg 50 ln 8-10, ln 12.)

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case, plaintiff could call the doctors live at trial.

Dr. VandenBerg went on at great length concerning his diagnosis of traumatic brain injury. The basis for the diagnosis was the loss of consciousness and amnesia at the scene (D. Tpr., Dr. Christian VandenBerg, pg 26 ln 7, pg 27 ln 20.) Dr. VandenBerg further described complaints of dizziness as consistent with a traumatic brain injury (D. Tpr., Dr. Christian VandenBerg, pg 29 ln 19.)

Dr. VandenBerg documented the principal physical complaints involving the right side of Mrs. Minter's head which was the area of the severe laceration. (D. Tpr., Dr. Christian VandenBerg, pg 42 ln 14, ln 23.) Dr. VandenBerg opined that the continued complaints of dizziness are consistent with traumatic brain injury (D. Tpr., Dr. Christian VandenBerg, pg 42 ln 23.)

Dr. VandenBerg described that dizziness and waking up at night with a headache are consistent with traumatic brain injury as well as blurred vision (D. Tpr., Dr. Christian VandenBerg, pg 43 ln 19, pg 44 ln 7, ln 8, ln 25.) Unsteadiness on feet as well as anxiousness and nervousness are cognitive deficits consistent with traumatic brain injury (D. Tpr., Dr. Christian VandenBerg, pg 45 ln 10, ln 16, ln 25.) Dr. VandenBerg described the ringing in the ears as consistent with the motor vehicle collision (D. Tpr., Dr. Christian VandenBerg, pg 46, ln 1-18, 19-25.)

As a result of the traumatic brain injury, Dr. VandenBerg instituted cognitive rehabilitation to develop compensatory strategies designed for individuals with traumatic brain injuries (D. Tpr., Dr. Christian VandenBerg, pg 51 ln 3-6, ln 25, pg 52 ln 1, pg 55 ln 9-26, pg 56 ln 1-9.)

Dr. VandenBerg further described that the cognitive deficits are consistent with the traumatic brain injury from the motor vehicle collision (D. Tpr., Dr. Christian VandenBerg, pg 58 ln 1, pg 60 ln 1-25.)

To summarize Dr. VandenBerg's deposition testimony, there is clear objective evidence of a traumatic brain injury that was sustained by Plaintiff/Appellee, Dorothy Minter, during the subject motor vehicle collision. Plaintiff/Appellee, Dorothy Minter, describes the classic symptoms of a traumatic brain injury emanating from loss of consciousness and amnesia the natural sequela

being headaches, dizziness, vestibular dysfunction, memory deficits, difficulties staying on tasks as well as nervousness and personality disorders. A copy of the deposition transcript of Dr. Christian VandenBerg detailing his expert medical opinions as they relate to Mrs. Minter's traumatic brain injury is part of the record before this Honorable Court.

EFFECTS UPON PLAINTIFF/APPELLEE'S GENERAL ABILITY TO LEAD HER NORMAL LIFE

Attached for the Court's review, is a deposition transcript of Plaintiff/Appellee, Dorothy Minter, the D. Tpr. of Plaintiff/Appellee, Dorothy Minter, is riff with evidence hat the August 15, 2002 motor vehicle collision and resultant injuries have seriously effected her general ability to lead her normal life.

As outlined above, Plaintiff/Appellee, Dorothy Minter, was completely independent in all aspects of daily living prior to the collision.

A. Closed Head Injury

As a result of the injury to her head, Plaintiff/Appellee, Dorothy Minter, described headaches approximately two to three times per day lasting as long as 30 to 45 minutes (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 32 ln 2-25, pg 33 ln 4).

Mrs. Minter further described difficulty with memory and that she often can "be talking and forget what I am talking about" (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 35 ln 10-14). This occurs daily (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 35 ln 19.)

Mrs. Minter described continued episodes of dizziness, as well as balancing issues (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 35 ln 22, pg 36 ln 5.)

Relating to memory issues, Mrs. Minter described, "I am nervous, I am very forgetful. I forget things quite rapidly. I could ... that why I don't cook. I forget to turn things off. You know it is my memory that concerns me a lot because it was good before but now I can't remember like I used to" (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 40 ln 1-8.) Mrs. Minter described blurry

vision which she attributes to the head injury (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 64 ln 18.)

Attached for the Court's review, beginning on page 76 are a series of questions documenting Mrs. Minter's natural sequela associated with a closed head injury including memory deficits, difficulty reading and nervousness. Mrs. Minter described being more irritable after the collision (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 81 ln 4-7.)

Mrs. Minter described restricted activities including walking and dancing and other lifestyle changes that I am not too comfortable walking and crossing the street (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 39 ln 24-25.) Mrs. Minter described that she used to walk a lot but that she can no longer walk or dance as much D. Tpr., Plaintiff/Appellee, Dorothy Minter, (pg 38 ln 8-9, ln 21.)

B. Cervical Injury

Plaintiff/Appellee, Dorothy Minter, sustained objective evidence of cervical injury which has manifested itself in restricted range of motion throughout the cervical and shoulder region (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 25 ln 15.) Mrs. Minter described her neck continues to ache (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 26 ln 1.) Mrs. Minter described that she does not go out too much and she cut out her card playing (D. Tpr., Plaintiff/Appellee, Dorothy Minter, pg 27 ln 13-16.)

C. Fractured Right Big Toe

As a result of the collision, Plaintiff/Appellee, Dorothy Minter, sustained a fractured right big toe. This is objective evidence of injury. As a result of the fracture, Mrs. Minter was obligated to wear an orthopedic shoe for approximately one month. During this period of time, Mrs. Minter had restricted weight bearing on that foot.

THE RECORD BEFORE THIS HONORABLE COURT ESTABLISHES A QUESTION OF FACT AS TO WHETHER PLAINTIFF/APPELLEE, DOROTHY MINTER SUSTAINED PERMANENT SERIOUS DISFIGUREMENT

Dr. VandenBerg saw Mrs. Minter on December 17, 2002 at the Mild Traumatic Brain Clinic noting continued headaches and difficulty with memory, cervical dysfunction was also noted.

On December 4, 2002, Plaintiff/Appellee, Dorothy Minter, was evaluated by Plastic Surgeon, Douglas M. Leppink, M.D. Mrs. Minter presented a medical history consistent with the above. Mrs. Minter described chronic pain of the right forehead in the area of the rather deep laceration. Mrs. Minter further described chronic irritation in the area when she wrinkles her forehead. Dr. Leppink opined, "this relates undoubtedly to a trapped nerve (suproaorbital) in the area of the right brow. Dr. Leppink opined that surgical revision of the neuroma would be necessary to gain any significant improvement. Dr. Leppink described this as a sensory nerve." (**Exhibit 12 -- Medical records, Douglas M. Leppink, MD**).

On September 23, 2003, Plaintiff/Appellee, Dorothy Minter, was evaluated by Plastic Surgeon, James M. Lawson, M.D. Attached for the Court's review, is the medical narrative authored by Dr. Lawson upon completion of the evaluation. Mrs. Minter described continued headaches and attacks of dizziness since the collision.

Dr. Lawson described the residual scarring around the right eyebrow and upper eyelid. Dr. Lawson described two separate scars measuring 13 mm and 11 mm in length. Dr. Lawson described the scars as complex forming a triangle of deformity and irregularity of the skin. Dr. Lawson opined that all the scars taken together are very noticeable.

Dr. Lawson opined that surgical intervention would be necessary and that regardless of any surgical procedure that the scarring would be permanent. (**Exhibit 13 -- Medical records, James M. Lawson, M.D.**).

Whether an injury amounts to, "permanent serious disfigurement" depends on its physical characteristics rather than its effect on a Plaintiff/Appellee's ability to lead a normal life. Nelson v Meyers, 146 Mich App 444 (1985). With regard to serious permanent disfigurement, the evidence is clear that the scarring suffered by Plaintiff/Appellee, Dorothy Minter, is permanent in nature as

evidenced by the photographs attached hereto. (**Exhibit 14 -- Color photographs of residual scarring taken July 2006**).

In Pettaj v Guck, 178 Mich 577 (1989), (a serious permanent disfigurement case), the court held whether a determination of whether a disfigurement is a jury question.

In Kosack v Moore, 144 Mich App 485 (1985), the court held whether a injury amounts to a serious permanent disfigurement depends on the physical characteristics rather than its effect on Plaintiff/Appellee's ability to lead a normal life.

As to the issue of " permanent serious disfigurement," when questioned about her scars, Plaintiff/Appellee testified that she is embarrassed because of the scar above her eyebrow and that people stare at her and that the wound goes numb (pg 81 ln 17-24, pg 82 ln 1-7.) Mrs. Minter testified that the scarring is pressure sensitive.

As indicated earlier, Dr. Luppink believes that there is a nerve entrapment component associated with this scar. Dr. Luppink believes that surgical revision of the scar by removal of the nerve would be necessary.

In Sanders *v* Cantin, Unpublished Opinion No. 240065, dated September 16, 2003 **(Exhibit 15 – Sanders Unpublished Opinion No. 240067)** (emphasis added), the Court of Appeals addressed the issue of "permanent serious disfigurement". In Sanders the Court of Appeals, on facts very similar to the case at bar, held the Plaintiff's scar to be a permanent serious disfigurement and reversed the grant of summary disposition in favor of Defendant, and in fact went on to grant summary disposition in favor of Plaintiff. The pertinent analysis regarding "permanent serious disfigurement" is set forth as follows:

> Whether a scar is a **permanent serious disfigurement depends on its physical characteristics** rather than its effect on the Plaintiff's ability to lead a normal life. Kosack v Moore, 144 Mich App 485, 491; 375 NW2d 742 (1985)
>
> . . .
>
> Whether the **scar is serious is a question to be answered by resorting to common knowledge and experience**. Nelson v Meyers, 146 Mich App 444, 446, n2; 381 NW2d 407 (1985). We

> find that the scar in question is indeed serious. It is approximately six inches long, raised, and located on Plaintiff's left abdomen above the waistline. The scar is **drastically darker than the surrounding skin, making it immediately apparent and distinguishable**. While the trial court reasoned that the scar was not serious because it was in an area "that would normally be covered," we disagree with that rationale. **The proper inquiry relates to the physical characteristics of the scar, Kosack, *supra*, not the ability of the scar to be covered.**

Sanders, p2.

Much like this case where the Defendant/Appellant appears to argue that Plaintiff/Appellee's scar is not serious, the court found **whether a Plaintiff can cover the scar with clothing has absolutely no bearing on whether the scar is a "permanent serious disfigurement".** Rather:

> Furthermore, the fact that the trial court noted that the scar was "on a man" bears no relationship to any relevant factor. Men frequently doff their shirts in warm weather as well as when participating in athletic and bathing activities. **Should Plaintiff choose to participate in such activities, his scar would be clearly evident to a casual observer due to its physical characteristics.**

Sanders, p2.

The same is true here, where Plaintiff/Appellee testified the scars have impacted her overall appearance.

The Court of Appeals again recently addressed the issue of "permanent serious disfigurement" in Martin v Interstate Brands, Unpublished Opinion No. 247727, dated September 20, 2005. **(Exhibit 16 – Martin Unpublished Opinion)** Also see Lester v Castle and Lester, Unpublished Opinion No. 267640, dated June 15, 2006. (**Exhibit 17 – Lester Unpublished Opinion**) In Martin the court reiterated that determining the serious of a scar is a matter of common knowledge experience for the courts (citing Nelson v Myers, 146 Mich App 444; 381 NW2d 407 (1985)). In *Martin,* the Plaintiff had a twenty millimeter scar about his right eyelid, a smaller scar near his right elbow and a smaller scar near his right kneecap. In particular, the Martin court found it pertinent that, just like in the case at bar, the photographic

evidence indicated that the scar was darker than the surrounding skin. Accordingly, the Court of Appeals indicated that there was a factual dispute concerning the nature and extent of Plaintiff's injuries, warranting that the issue should proceed forward before a jury.

The court cited Nelson v Myers, 146 Mich App 444; 381 NW2d 407 (1985) in support of the proposition that **determining the seriousness of a scar is a matter of common knowledge and experience for the courts.** In other words, the photographs of Plaintiff/Appellee's scarring speak for themselves and provide dispositive proof per Michigan law that Plaintiff/Appellee suffered a permanent serious disfigurement. Plaintiff/Appellee is not required to consult with a plastic surgeon in order to meet the "permanent serious disfigurement" standard. Nothing in the case law or statute requires a consultation with a plastic surgeon. Rather, the courts have acknowledged that determining the seriousness of a scar is a matter of common knowledge and experience.

Plaintiff/Appellee contends that, at the very least, there is a material question of fact regarding whether Plaintiff/Appellee's facial scar constitutes a permanent serious disfigurement.

RELIEF REQUESTED

Plaintiff/Appellee, Dorothy Minter, hereby requests that this Honorable Court reverse the Trial Court's ruling, and remand this matter for further proceedings.

Respectfully submitted,

BERNSTEIN & BERNSTEIN

BY:_____
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Dated: June 14, 2007